No. 2725.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation, SALMON RIVER CANAL COMPANY, LIMITED, a Corporation, COMMONWEALTH TRUST COMPANY OF PITTSBURGH, TRUSTEE, and A. C. ROBINSON,

Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. POND, JAMES W. BEAUCHAMP, CARL WASHBURN, and HAROLD M. SIMS, In Their Own Behalf and in Behalf of All Persons Similarly Situated with Them,

Appellees.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

Brief of Albert N. Edwards, St. Louis, Missouri, Amicus Curiae

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STATEMENT.

The far-reaching effect of a decision on some of the questions involved in this action seems to the undersigned to justify submitting, as a friend of the Court, the following

suggestions which seem equally pertinent whether one accepts the contention of appellees that the Irrigation Company sold to the settlers a definite quantity of water, or simply an undivided and proportionate interest in the canals, structures and water appropriations, as contended by the appellants. And for fear that we may weary the Court with a restatement of facts, with which the Court may be already familiar, we submit our suggestions in the briefest possible form, believing that the legal questions which are presented are sufficiently clear without argument:

POINTS.

1. The Federal Government is the source of title to lands reclaimed under the Carey Act, and Congress has in that Act set forth the conditions upon which title may be obtained and the amount of water that must be provided per acre, viz.: An amount that "shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops," (Sec. 4, Act approved August 18, 1894), and "an ample supply of water * * * to reclaim" the particular tract or tracts to which the applicant seeks to obtain title. (Act approved June 11, 1896.)

2. The Federal law is necessarily supreme as to the terms and conditions upon which the Government shall part with its title to the public domain, and the laws of the State of Idaho must be construed in harmony therewith, and that such was the intention of the state legislature, is shown by the following extracts from the statutes:

(a) "The State of Idaho hereby accepts the *conditions* of Section 4 of an Act of Congress, entitled, 'An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes,' approved August 18, A. D. 1894, together with all the grants of land to the State under the provisions of the aforesaid Act."

Session Laws 1895, page 215.
Session Laws 1899, page 282.
Sec. 1613, Revised Codes of Idaho.

(b) "When the works designed for the irrigation of land under the provisions of this chapter shall be so far completed as to *actually furnish an ample supply of water* in a substantial ditch or canal to reclaim any particular tract or tracts of such lands, the State of Idaho shall, through the State Board of Land Commissioners, make proof of such fact and shall apply for a patent to such lands in the manner provided in the regulations of the Department of the Interior."

Session Laws 1895, page 215, Sec. 19.
Session Laws 1899, page 282, Sec. 19.
Section 1628, Revised Codes of Idaho.

3. The public policy of the State is not inconsistent with the provisions of the Carey Act that the settler shall receive an ample supply of water and that patent shall issue only upon proof of that fact. It is provided in Section 3289 of the Revised Codes "that no person, company or corporation shall contract to deliver more water than such person, company or corporation has a title to, by reason of having complied with the laws in regard to the appropriation of the public waters of this State." And by an Act approved March 13, 1909 (Session Laws 1909, page 335), provision is made against the sale of water rights by private corporations until the sufficiency of the supply has first been approved by the State Board, and severe penalties are imposed on the officers and agents of such corporations for selling water rights except in accordance with the provisions of said Act.

4. The correct construction of the State and Federal laws relative to Carey Act projects and of the contracts involved in this case, must be that undivided and proportionate inter-

ests in the irrigation system and water rights may be sold to the limit of the available supply, or to a point where such undivided interest will entitle the owner to a water supply sufficient to obtain title to his land under the Federal statutes. Beyond that point sales cannot be made, and all contracts entered into after that limit has been reached, must be absolutely null and void, unauthorized alike by State and Federal laws. Any other construction would lead to the disastrous situation that a settler who had purchased water rights before such limit had been reached, would without his knowledge, acquiescence or consent, be deprived of his property—of all possibility of obtaining title to his land, by the Company selling water rights in excess of the limit or to an extent that would leave each settler less than an "ample supply," as required by the Federal law as a condition precedent to the issuance of patent.

5. The limit on the sale of water rights is therefore not only that the sale of undivided interests shall not exceed the theoretical appropriation made by the construction company (1500 second feet in the instant case), but in the event the actual supply be less than the theoretical appropriation, the sale cannot exceed the actual supply under a water duty to be approved by the Secretary of the Interior when application for patent is made under the Carey Act. Sales beyond the actual supply must be held absolutely null and void and cannot be construed to operate as a diminution or reduction of the rights that had previously been sold. Each purchaser in his order must be held to have purchased and acquired a supply sufficient to entitle him to patent. Less than that would defeat his title to the land, and neither the State nor the parties to the contract can be held to have intended such a result. The State in accepting the final proof of the settler requires that such proof "shall embrace evidence that he is

owner of shares in the works which entitle him to a water right for his entire tract of land *sufficient in volume for the complete irrigation and reclamation thereof.*" If this provision be observed a situation cannot arise where the State has accepted final proof and issued its final certificate to a settler who cannot obtain patent from the Federal Government because of the insufficiency of the water supply.

6. While conceding the doctrine of dedication and the sale of undivided and proportionate interests and the rule of parity between water users, as contended for by appellants, we respectfully submit that where the available supply is insufficient to entitle the State to patent for all the lands segregated, there is the further limitation on the sale of water rights that such rights cannot be sold beyond the acreage for which patent may be obtained and that all contracts entered into after such limit has been reached are absolutely null and void and such contracts cannot operate to defeat those who purchased before such limit was reached, of their title or of the opportunity to obtain patent to the lands which they may have entered.

Respectfully submitted,

ALBERT N. EDWARDS,

St. Louis, Missouri,

Amicus Curiae.